IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

EASTERN AIR LINES INC.,

Petitioner,

v.

JOSEPHINE ST. CLAIR, as Executrix of the Estate of Harold W. St. Clair, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc., defendant in the District Court, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment (No. 273) en-

tered on June 2, 1960, which reversed a judgment for plaintiff in the sum of $24,000 entered in the United States District Court in the Southern District of New York upon a jury verdict, after trial on the sole issue of the damages sustained by plaintiff in this action for the death of Harold W. St. Clair. This action for wrongful death is one of the passenger death cases arising out of the mid-air collision which occurred on November 1, 1949 when petitioner's DC-4 airplane was struck from above and behind by a Bolivian P-38 military type airplane during final approach to Washington National Airport. The action is governed by the Wrongful Death Act for the District of Columbia. Petitioner's liability to respondent for the death of her husband under said death act was established in a suit brought by the estate of another passenger killed in the same collision, by which determination the parties agreed to be bound. This Court has considered various issues in the controlling decision during 1955 and 1957.[1]

Opinion Below

The opinion of the United States Court of Appeals is reported in — F. 2d —, [6 Avi. 18,065].

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[1] See *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D. D. C. 1953) [3 Avi. 18,177], modified, 221 F. 2d 62 (D. C. Cir.) [4 Avi. 17,546], defendant's appeal affirmed, 350 U. S. 907, plaintiff's appeal cert. denied, 350 U. S. 911 (1955); *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir.) [4 Avi. 17,546], reversed, 350 U. S. 907 (1955), modified and remanded on rehearing, 350 U. S. 962, on remand, 239 F. 2d 25 (D. C. Cir. 1956) [4 Avi. 18,226], cert. denied, 353 U. S. 942 (1957).

Jurisdiction

The judgment of the United States Court of Appeals is dated June 2, 1960 and was entered on the same day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Is evidence of the immoral character of the deceased, based upon events occurring during the twelve months' period prior to his death, relevant to the issue of the pecuniary loss sustained by his widow and next of kin in a wrongful death action brought under the District of Columbia Death Act.

2. Where the cumulative effect of the evidence in the case, including evidence adduced by respondent, overwhelmingly demonstrated the alcoholic condition of the decedent during March-April, 1949, approximately 8 months prior to his death, was the respondent prejudiced when petitioner's attorney attempted to impeach the credibility of respondent's witness Stoller, who testified on direct examination that he had never seen decedent intoxicated during March-April, 1949, by referring to an extra-judicial prior inconsistent statement allegedly made by Stoller to an F. B. I. agent, where, the foundation having been laid, the F. B. I. agent was never proffered to impeach the testimony of the witness, and where the trial court in its charge substantially negated the effect of any alleged prejudicial error to respondent.

Statutory Law Involved

District of Columbia code:

CHAPTER 12

NEGLIGENCE CAUSING DEATH:

"§16-1201 [21:1]. Liability.

Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default, of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the spouse and next of kin of such deceased person; and shall also include the reasonable expenses of last illness and burial; Provided, That if there be a surviving spouse the jury shall allocate the portion of its verdict payable to the spouse and next of kin, respectively, according to the finding of damage to said spouse and next of kin: Provided further, That if in a particular case the verdict is deemed excessive the trial

justice or the United States Court of Appeals for the District of Columbia, on appeal of the cause, may order a reduction of the verdict: And provided further, That no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party. (Mar. 3, 1901, 31 Stat. 1394, ch. 854, §1301; June 19, 1948, 62 Stat. 487, ch. 507 §1.)

* * * *

§16-1203 [21:3]. *Distribution of damages.*

The damages recovered in such action, except the amount specified by the verdict or judgment covering the reasonable expenses of last illness and burial, shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed to the spouse and next of kin according to the allocation made by the verdict or judgment, or in the absence of such allocation, according to the provisions of the statute of distribution in force in said District of Columbia. Mar. 3, 1901, 31 Stat. 1395, ch. 854, §1303; June 19, 1948, 62 Stat. 487, ch. 507, §2.)"

Statement of the Case

On November 1, 1949 respondent's decedent, Harold W. St. Clair was a passenger aboard petitioner's airplane which was struck from above and behind by a Bolivian military type airplane during the airliner's final approach to the Washington National Airport. The passenger was instantaneously killed in the mid-

air collision (A. 140). His widow, Josephine A. St. Clair, a resident and citizen of the State of New York was subsequently appointed executrix of his estate, and instituted this action for the alleged wrongful death of her husband against petitioner, a corporation organized and existing under the laws of the State of Delaware. Jurisdiction of the District Court was invoked on diversity of citizenship of the parties pursuant to 28 U. S. C. 1332.[2]

On November 1, 1949 Harold W. St. Clair was 46 years old and he was survived by the respondent, his 37 year old third wife, who had married him on July 9, 1949 [Plaintiff's Exhibit 1-(A 296-297).[3] A six year old daughter, a child by his second marriage who resided with her mother (A 143), also survived.

The testimony of the Respondent is printed in full in Appellee's Appendix (A 139-258). That testimony reveals an intentional concealment by the widow

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[2] Respondent simultaneously instituted, under the Federal Tort Claims Act, a separate wrongful death action in the Southern District of New York (61-269) against the United States of America, as operator of the airport traffic control tower. Under the *Union Trust Co.* v. *United States of America* case, *infra*, the Wrongful Death Act of the Commonwealth of Virginia was held applicable to that claim. The trial of the issue of damages in respondent's action against the United States was tried to the trial court while her action against petitioner was simultaneously tried to a jury. Respondent recovered a judgment of $15,000 against the United States and respondent's appeal from that judgment was dismissed by the United States Court of Appeals for the Second Circuit on October 16, 1959 after the respondent conceded that said judgment represented the maximum sum recoverable under that death act.

[3] The letter "A" is used to designate the Appendices filed in the Court Below. The Appellant's Appendix (white cover) comprises pages A 1-132 and Appellee's Appendix (grey cover) comprises pages A 133-334.

of her husband's long history of alcoholism (A 157-159; A 164-165; A 165; A 170; A 227-228; A 244-245).[4]

Respondent admitted that she knew the sworn statement was false when made and that she intentionally misled the defendants below to believe her testimony was the truth (A 170). She conceded she lied in answering that interrogatory (A 227).

Respondent's attorney on direct examination brought out the matter of intentional concealment and respondent testified that she gave a sworn answer "because my husband made me take an oath that I would not reveal the hospitals he had been confined to" (A 159). She claims this oath could have been taken the very same day that he left the Towns Hospital about the middle of September, 1949 (A 159). She dramatically described how "he got down on his knees and he begged forgiveness for having done what he had done, for having been drinking as he was—that he was not going to touch it any more, *that for the first time in his life he was not going to do anything to destroy it*" (A 159-160) (Italics ours).

[4] At a conference with the trial judge in the robing room *immediately prior to the empaneling of the jury*, the attorney for respondent orally moved to amend respondent's sworn answer to Interrogatory No. 10 propounded by the United States of America on May 3, 1956. This interrogatory requested the name and address of each hospital, sanitarium, clinic, health farm or rest home in which the decedent received medical care, advice or treatment, within five years immediately preceding death. Respondent originally gave a sworn answer to this interrogatory reading "Jackson Memorial Hospital, Miami, Florida." Her attorney's motion to amend said answer to include the St. Francis Hospital and City Hospital, both located in Newark, New Jersey and the Towns Hospital located in New York was granted but petitioner advised the trial court it could not acquiesce in the court's ruling (A 135; A 242).

On cross examination plaintiff testified she remembered the making of the oath "because six weeks before his death he had not touched a drink" (A 164). This assertion was demonstratively false.[3]

During respondent's redirect testimony (A 240-243), her attorney attempted to rehabilitate her reputation for truth and veracity and to disassociate himself from these falsehoods. In replying to his interrogation she answered that she first told her attorney about her false statements concerning the three additional hospitalizations on the Sunday immediately preceding the trial (A 244), when they were reading the deposition of a Dr. Fortner. This Miami, Florida doctor, treated decedent or rendered medical assistance or advice to decedent with reference to his excessive drinking from March 4, 1949 to May 15, 1949 (A 273-292). According to respondent, Dr. Fortner's May 15, 1949 recommendation made pursuant to telephone call from St. Clair and female companion in New York (A 281-282), in which that doctor recommended further hospital care (A 282), caused respondent to reveal to her attorney her prior false sworn statements concerning decedent's hospitalization, as noted from the following extract:

"Q. I didn't ask you that. I asked you wheth-

[3] Defendant's Exhibit F (A 324), the record of the Towns Hospital of New York City establishes decedent was a patient at that hospital from October 1, 1949 to October 3, 1949 for alcoholism. Decedent was killed on November 1, 1949. Respondent on numerous occasions (A 208, 235, 236) constantly reiterated the refrain that he had not touched a drop of liquor during the six weeks' period immediately preceding death. She testified she and her husband had discussed his six weeks' abstention (A 236) and she adhered to the refrain although she was advised on cross-examination this hospitalization record completely refuted her statement (A 235).

er I (190) had read that portion of Dr. Fortner's testimony, where Dr. Fortner said Harold had called him from New York. A. No, I don't remember that.

Q. All right. And it was then for the first time that you told me of those instances— A. Yes, *with such evidence in front of me I had to reveal to you about his other hospitals* that he had been to" (A 245). (Italics ours.)

The hypocrisy of the alleged oath is best demonstrated by the fact that respondent felt obligated by it only when the defendants below were seeking the truth. Additionally, this alleged oath did not bind respondent in 1956 when she answered Interrogatory No. 10, that decedent was confined in "The Jackson Memorial Hospital, Miami, Florida".[6]

On September 27, 1928 the decedent married his first wife, Anna Elizabeth Armstrong [Defendant's Exhibit H (A 330)]. By a divorce decree of the Court of Chancery of the State of New Jersey [Defendant's

[6] Decedent was confined in the following institutions for alcoholism:

Ross Sanitarium, New York, September 26-28, 1946.
Defendant's Exhibit G (A 328-329).

Sun Ray Park Health Resort, Miami, Florida—April 13-15, 1949.
Plaintiff's Exhibits 34-40 [Exhibits 38, 39 and 40 photoprinted at A 310-315]. [Records covering confinement April 16-19, 1949 referred to by respondent's witness, Dr. Fortner (A 292) and Plaintiff's Exhibit 33 (A 308) could not be located.]

St. Barnabas Hospital, Newark, New Jersey—June 5-7, 1949.
Defendant's Exhibit A (A 316-319).

Newark City Hospital (New Jersey) June 7-9, 1949
Defendant's Exhibit E (A 320-323).

Charles B. Towns Hospital, New York City, October 1-3, 1949.
Defendant's Exhibit F (A 324-327).

Exhibit I (A 332)], decedent was found *guilty of willful, continued and obstinate desertion* of his first wife for a term of two years. The decree required him to pay her the sum of $25 per week, beginning August 23, 1938 and was operative on November 1, 1949. Respondent conceded decedent was not paying money to his first wife when they got married and she never saw him make out a check to his first wife for these payments (A 191-193).

On June 22, 1939 decedent married his second wife, Helen, and a daughter, Claire was born of this marriage on February 12, 1943 [Plaintiff's Exhibit 6 (A 300)]. This marriage was terminated by divorce because decedent was found *guilty of extreme cruelty* on June 30, 1949 [Plaintiff's Exhibit 6 (A 298-305)]. This decree incorporated a Separation Agreement, dated June 16, 1949, requiring the decedent to pay to his second wife for the support and maintenance of his minor child the sum of $50.00 per month if he earned less than $5,000 per annum.

Other factors bearing on the issue of pecuniary loss sustained by the respondent which was before the jury in this case were the following:

> Concerning the financial condition of respondent and the decedent, she testified that she had accumulated $4,000 in savings which (A 209), after her marriage to Harold W. St. Clair, she placed in their joint checking account. She had previously testified that he had brought with him approximately $200 on his May 1949 trip to New York City (A 179), and she knew of no income received by him after he left City Hospital (A 200) up to the time he acquired a job with the

American Plan Corporation on or about August 12, 1949. She couldn't tell the Court or Jury how much money he had when they got married on July 9, 1949 (A 201), but she conceded that she paid the rent for their apartment until September, 1949 (A 202) and her money supplied the necessary subsistence and maintenance for them during that period (A 202).

Respondent admitted that during the four month period of marriage, they depleted their joint bank account by the sum of $3,500 since she admitted there was $500 left in their joint bank account on the date of decedent's death (A 209).

Respondent testified that the decedent advised her that he was making about $500 a month in his job with the American Plan Corporation (A 209) but the testimony of respondent's witness Hart, the President of that corporation, disclosed that St. Clair was not an employee of the company (A 259); he was an independent contractor (A 259), a "free lance" contractor for the company and any money received by St. Clair prior to his demise represented an advance against future commissions (A 261) and that any commissions which might accrue in the future to St. Clair would have been deferred until the loss ratio on the risk insured came within the permissible limitation set up in the contract of hire. Respondent's witness Hart admitted that decedent had not earned any commissions during the business relationship which started on or about August 12, 1949 (A 260-261).

The evidence does not disclose any reformation of decedent after he obtained employment with the American Plan Corporation—a job which

made decedent very happy (A 207-209). The record of the Charles B. Towns Hospital of New York City [Defendant's Exhibit F (A 324)], discloses he was confined at that hospital for alcoholism *after that employment was obtained.* In fact, this hospitalization of decedent, for alcoholism occurred 28 days prior to his death, viz. from October 1, 1949 to October 3, 1949.

On direct testimony respondent testified that she saw decedent make out checks payable to the mother of his daughter, Claire, in the amount of $50 for each of the months of July, August, September and October (A 153, A 192) which he was required to pay under his second divorce decree [Plaintiff's Exhibit 6 (A 298-305)], but on cross-examination she conceded that it was her funds which were the basis for these payments (A 222-223)!

Since an element of respondent's pecuniary loss is the probable future continuance of the marriage, the following extracted testimony of the respondent, it is submitted, establishes most eloquently the mockery of the marriage which was about to be entered into between Josephine DePaola and decedent and the conditions under which that marriage was contracted:

"Q. Now, on June first, you say that he had drunk so excessively that you or he or both had sought his admission to a hospital in Newark? A. *I had nothing to do with it.*

Q. I am sorry. A. That was his cousin that confined him to that hospital.

* * * *

Q. That is, after those two weeks of your social (99) gatherings, Miss Tramm thought that he

should go to the hospital or have him admitted to the hospital in Newark, isn't that so? A. That is true" (A 187) (Italics ours).

Testimony Concerning Initial Acquaintanceship Between Respondent and Decedent Held Irrelevant and Prejudicial

Respondent, a resident of New York City during 1948 and 1949 testified on direct examination that she met decedent about November 4, 1948 and she subsequently met him again about the middle of May, 1949 (A 144). They were married on July 9, 1949. On cross examination, *no objection was made by respondent's attorney to the inquiry into this general subject matter of initial acquaintanceship*—a subject which the court below states was admitted by the trial court *over the objection of respondent's counsel*. Since the opinion sought to be reviewed considers this part of the cross examination of respondent to be prejudicial error, petitioner reproduces here the following complete extract of that part of her testimony.

"Q. Now, tell me, when did you first meet Mr. St. Clair? A. When did I first meet him?

Q. When did you first meet him? Was it November 4th? A. It was about November 4th, of 1948.

Q. Will you tell us how you met him or the circumstances? A. Well, as you know, he was living in Florida at the time and he did meet a friend of mine, a Mr. Greenspan—I had known Mr. Greenspan for some twenty-odd years. When Mr. Greenspan heard that Mr. St. Clair was going to (74) New York, he says, 'Well, look up a friend of mine,' meaning me.

Q. Mr. Greenspan in Florida— A. Mr. Greenspan asked my husband to call me when he got to New York.

Q. Just so that you do not confuse me——

Mr. Ticktin: Don't confuse the witness. Will you permit the witness to answer the question please.

Q. When you say, 'He told my husband,'——

Mr. Ticktin: Please, I do not want to be disregarded. May I ask the intercession of the Court, that the witness be permitted to finish her answer without interruption.

The Court: I did not know that she hadn't finished.

Mr. Ticktin: I suspected that she had her mouth open at the time Mr. Reilly asked her another question.

The Court: Had you finished?

The Witness: I do not think I did.

The Court: The Lady said she hadn't. You may finish.

Q. When you said—(75)

The Court: No, no.

Mr. Reilly: Shall I continue?

The Court: No, the lady has to finish.

Mr. Reilly: Oh, forgive me.

A. Well, let me begin again. Mr. Greenspan told my husband, Mr. St. Clair, to look me up when he got to New York, which he did. He called me on Thursday and asked me if I would have dinner with him. It so happened I was busy that night, I was busy Friday night, I told him

I could see him Saturday night, which I believe was November 4th.

Q. Do I understand correctly, then—of course, he wasn't your husband then? A. No, he wasn't. That was 1948. He was a total stranger.

Q. A total stranger. This was in November, 1948. About November 4th, you say? A. About November 4th.

Q. Tell me, was his introduction—did he offer his own introduction to you over the phone? A. Yes, he did.

Q. He said, 'I am a friend of Mr. Greenspan's'? A. That is right.

Q. 'Mr. Greenspan said that if I am up in New York, I should look you up?' A. Yes, he should call me.

Q. And then he said—so that he was doing that to sort of make a date with you?

Mr. Ticktin: I object to that, if it pleases the Court.

Q. Well, what did he seek, tell me.

Mr. Ticktin: Hold it.

The Court: Just a moment. Why do you object.

Mr. Ticktin: I object on the ground that he is drawing a conclusion from what Mr. St. Clair's mental operations were.

The Court: Well, he can ask the lady whether that was his intention, and she can tell us.

Mr. Ticktin: If he so stated to her, that is another proposition.

The Court: No, she can tell what her impression was. Was it your impression?

Mr. Ticktin: I object to it, may it please the Court.

The Court: You may (sic) even exception.

(To the witness.)

Was it your impression, madam, when he called you, saying he had been introduced to you over the phone or down in Florida, was it your impression that he was trying to make a date with you?

The Witness: He asked me if I would have dinner with him and go to the theatre.

The Court: My question is, was it your impression that he was trying to make a date with you?

The Witness: Yes.

Q. And then you declined for that evening because of other business or engagements? A. That's right.

Q. And he pursued and he asked you about the next evening, which was Friday? A. True.

Q. And you were committed that evening, too, isn't that so? A. Yes.

Q. Or had some other engagement? So that he still pursued the matter and you made it for— A. Saturday night" (A 170-173) (Italics ours).

Respondent's Knowledge at theTime She Began Seeing Him That He Was Then Married to Another Woman Held Irrelevant and Prejudicial

After the trial counsel for petitioner had elicited the foregoing social relationship which existed between respondent and the decedent during a period *less than a year prior to his demise*, and after the jury had been apprised from the direct testimony and

from Plaintiff's Exhibit No. 6 introduced during that part of the case that decedent was still married to his second wife during November, 1948, the attorney for petitioner asked respondent the following question which precipitated the following objection on the part of her attorney and colloquy with the court.

"Q. Did you know that he was married?

Mr. Ticktin: I object to the question.

The Court: It might have some relevancy on the decedent's character. I will allow it.

Mr. Ticktin: The decedent's character is not a matter of the issue, if your Honor please.

The Court: Not his character as such, but the jury should be entitled to know a great deal about him. (80)

Mr. Ticktin: Oh, *I do not want to keep anything from the jury* but we are concerned more with his earning power more than we are with his morals, and we are not trying his morals or income tax return or anything else that has been injected into this case.

The Court: That is correct, but I will allow it. (To the witness.)

Did you know that he was married?

The Witness: Not that night—I don't believe it was that first night that I met him. I believe he told me that the next day—it could have been on a Sunday—the Sunday—well, the following day.

Q. So that you were told then, I would approximate the date as November 5th? A. About that, yes.

Q. You knew he was married? A. Uhuh" (A 174-175) (Italics ours).

Respondent's Familiarity With the Progress of the Divorce Suit Brought by Decedent's Prior Wife Held Irrelevant and Prejudicial

On cross-examination, respondent was interrogated about the foregoing subject, *to which no objection was made.* The Court below declared that the foregoing subject was admitted, *over the objection of respondent's counsel.* Any objections made by her attorney to specific questions were sustained, as noted from the following extract of this portion of the testimony:

"Q. And on May 15th or thereabouts when he called you from Philly—he said—he called you 'Jo', did he? A. Yes.

Q. Was that the third or fourth time that you had met him? A. No, that was the fifth time.

Q. The fifth. Forgive me. So he told you over the wire, did he, that he was getting divorced? A. Yes.

Q. And you met him where? A. I didn't meet him. He came to my apartment because he didn't know exactly what time he would be arriving in New York.

Q. Oh, I see. Now, do you not know from subsequent (84) events that there was no proceedings instituted at that time? Do you not know that now, that on May 15th there was no proceedings instituted for this divorce that you say he was—A. I only took his—he told me that his wife was suing for a divorce. That is all I have to know.

Q. Did you eventually—I see—did he discuss with you, for instance, the grounds of the divorce? A. No, I don't think—I don't remember.

Q. Do you mean to convey to the Court and the

jury that at that time, in May 15th, you say—withdrawn.

Q. Did you say he was suing for the divorce? A. No, I did not say that he was suing for the divorce.

Q. That she was? A. That Helen was suing for the divorce.

Q. Helen was his second wife? A. Helen was his second wife, yes.

Q. Now, tell me, did you understand that on May 15th, Helen, his second wife, had instituted proceedings? A. Yes.

Q. But you have since learned that no proceedings were instituted at that time, have you not? A. They were.

Mr. Ticktin: She did not so state.

The Court: She has already said that they were.

Q. You say the proceedings were instituted? A. Yes.

Q. On May 15th? Did he tell you, for instance, in this discussion with you—did he tell you the reasons for why Helen was divorcing him? A. No——

Mr. Ticktin: May it please the Court, I do not see how that is material at all to the issue of how much we are entitled to.

The Court: Do you wish to make an objection?

Mr. Ticktin: I make such an objection, your Honor.

The Court: Sustained (A 177-178).

* * * * * *

Q. Did you not make inquiry of him as to what the reasons for the divorce from Helen were (102)?

Mr. Ticktin: I object to the form of the question.

The Court: Sustained.

Mr. Ticktin: I think the form——

The Court: Sustained.

Q. Did he not tell you—did your husband—your husband-to-be of the next day tell you what had been the reasons of the grounds for the divorce? A. He may have told me. I don't remember.

Q. Tell me, wouldn't your feminine curiosity have— A. I say he may have told me, but I don't remember.

Q. You don't remember, I see.

Just before I leave that, and I shall now, isn't that your thought, that you must have asked him?

Mr. Ticktin: I object to the question.

The Court: Sustained" (A 189).

Whether the Decedent Had Been Living at the Respondent's Apartment Prior to Their Marriage Held Irrelevant and Prejudicial

Respondent testified on direct examination that prior to their marriage, he stayed at the Roosevelt Hotel in New York City during May 1949 (A 144).

During the initial cross examination of respondent on this subject petitioner adhered to her previous testimony that he resided at this hotel (A 179-180) and that the hotel was his address during May 15th

to and including June 1, 1949 (A 181). She further testified that the latter date was the approximate day he entered St. Barnabas Hospital (A 179) for alcoholism (A 166-167).

She emphatically denied (A 181) that decedent resided at her address, 310 East 44th Street, an apartment house known as the Beaux Arts (A 181) and *no objection was made by her attorney* to this line of questioning when the subject was originally asked. She conceded that Plaintiff's Exhibit 1, the marriage license and affidavit for license to marry stated that on July 8, 1949, the day preceding their marriage, that the residential address of decedent was her address, viz. 310 East 44th Street (A 181). She further admitted that decedent did not maintain an apartment at this address at any time other than when he lived in her apartment. This admission arose from the following question which was asked, *without objection*, when the following answer was elicited:

> "Q. At any time previous or subsequent to your marriage, when he lived at 310 East 44th Street, was it in an apartment other than your own? A. It was in my own apartment" (A 182).

While the respondent was on the witness stand, the record of the St. Barnabas Hospital arrived in the Courtroom (A 253) and this record, dated June 5, 1949, disclosed that the patient, Harold W. St. Clair, resided at "310 East 44th Street, New York City." The attorney for petitioner showed the document to respondent (A 253). Counsel for respondent did object to the use of a document which had not been marked into evidence. Petitioner's counsel immediately had the document marked for identification and respondent's attorney acquiesced in this procedure (A 254).

The document marked Defendant's Exhibit A for Identification was shown to the witness (A 254). Thereupon the following question was propounded to this witness which resulted in the following colloquy:

> "Q. I am going to ask you to tell his Honor and the jury do you still say to this jury that Harold St. Clair didn't live at the same number or at your apartment or at 310 East 44th Street before you were married. A. I still——
>
> Mr. Ticktin: I object to the question, may it please the Court. It is immaterial, and let us say further that he did live there and he consorted with this now widow of his, what right is there of the Eastern Air Lines to bring this out and villify this dead man's character?
>
> The Court: Is that an objection, counsel?
>
> Mr. Ticktin: It is an objection, sir.
>
> The Court: I will overrule it.
>
> All right. Shall we consider it a stipulation?
>
> Mr. Ticktin: Oh, no sir. I said assuming that.
>
> The Court: Oh, I am sorry. (207)
>
> The question is allowed.
>
> Do you still say, madam, that he did not live at that address on East 44th Street?
>
> The Witness: I still say he did not live at that address."

The foregoing objection (A 256-257) became academic because the hospital record of St. Barnabas, dated June 5, 1949, was subsequently introduced into evidence on respondent's case as Defendant's Exhibit A, without objection. The same inference concerning the residency of the decedent arises from this docu-

ment which was in evidence as developed from the foregoing question propounded to respondent.

Cross Examination of Witness Philip Stoller Held Prejudicial

On the direct case respondent's attorney read from the deposition of a witness named Phflip Stoller, who was the Treasurer of the American Bankers Insurance Company of Miami, Florida during 1949. Decedent was the President of this company from the latter part of 1948 to April 15, 1949 (A 73). The witness testified about the decedent's business ability and at the deposition the witness was cross examined by a Mr. Clark, an Assistant United States Attorney in behalf of the United States, which was then a party to the action.

This witness testified on direct examination that he had never seen decedent under the influence of liquor during 1949.[7]

---

[7] Respondent's witness, Dr. Fortner testified that approximately two weeks prior to March 21, 1949 (A 275-276) he treated St. Clair in the latter's home in Miami, Florida for a gastric upset arising from alcoholic over-indulgence (A 276). On March 21, 1949 he made a physical examination of the decedent in his office and diagnosed a condition of liver enlargement with tenderness (A 287). Medical treatment didn't cure this condition (A 287) and excessive drinking is one of the causes for the enlargement of a liver (A 412). Subsequent to March 21, 1949 Dr. Fortner referred St. Clair to the Sun Ray Park Health Resort (A 277, 283, 284) for his alcoholism (A 283). This doctor described the Sun Ray Park Health Resort as a sanitarium primarily for the treatment of chronic illnesses and alcoholism (A 278). The decedent was a patient in that institution from April 13 to April 15, 1949 and was readmitted on April 16 for an additional three day period for the same alcoholic condition (Plaintiff's Exhibit 34). During his confinement to that institution he received sedation, vitamins and supportive treatment including the taking of Vitamin B-1, calcium gluconate and whiskey, the latter only when absolutely necessary (A 279).

Mr. Stoller further testified that a serious dispute between decedent and Mr. Landon, the substantial owner of the company, arose about March or April 1949 (A 83).[8]

Petitioner's attorney thereupon read certain questions originally propounded to the witness by the Assistant United States Attorney. These questions dealt with the question whether he had given a statement to an F. B. I. Agent named Brady, as noted from the following extract:

> "'Q. Mr. Stoller, do you recall being interviewed by John Brady of the Federal Bureau of Investigation on or about November 13, 1957? (367) A. I do.
>
> 'Q. At that time, did you make the statement to him that you recalled that there were occasions when you would contact Mr. St. Clair in this office to sign checks and that Mr. St. Clair would be unable to sign checks because of an alcoholic condition. Stop and reflect. Did you make that statement? A. ——
>
> * * * *
>
> Mr. Ticktin: I object to that question, if it please the Court, on the ground that the question

[8] Dr. Fortner testified that during his visits to St. Clair's Florida residence in March-April, 1949 when he was called to administer to decedent for excessive drinking (A 93), he observed some business associate present in the house with decedent's second wife, Helen (A 280). That witness further testified (A 290) that he had telephone conversations with a Mr. Landon, St. Clair's boss in Florida, during the earlier part of 1949. Additionally, respondent's attorney brought out from this doctor certain conversations between him and St. Clair concerning his 'business' difficulties (A 95) including a recommendation by this doctor to the decedent that 'I invited him to go down to Mr. Landon's office and try to straighten up some of his business affairs' (A 94).

is improper; it is incompetent. It is not permissible under the rules of evidence as I understand them to be. *I think the first question should be asked in a different form, and for that reason I object to it.*

The Court: Overruled (A 83-84).

* * * * *

"Q. Did you make any statement at all? A. I never made any statement—anything pertaining to Mr. St. Clair's condition, to the best of my knowledge.

"Q. Let me ask you this: did you make any statement to Mr. Brady, the F. B. I. agent, in regard to Mr. St. Clair's drinking?" (A 84) (Italics ours).

Thereafter colloquy arose concerning the necessity of reading unanswered questions on the same subject, but in a slightly different form to obtain the continuity of a question which was answered. The witness adhered to his previous testimony that he had not told the F. B. I. Agent that he had seen decedent under the influence of liquor on the job (A 85-89).

Respondent's attorney, prior to the charge of the Court, requested the trial judge to charge in connection with the foregoing testimony as follows:

"I ask your Honor to charge as follows: In the absence of any proof to the contrary, the jury may not infer from the fact that a question is asked and answered in the negative that there is any truth to the matter set forth in the question" (A 111).

The Court refused to so charge and granted an exception (A 118).

The Court did charge on this matter as follows:

> "Now with one exception I am not making any comments on the evidence, because there does not appear to be much that is in dispute either in connection with Mr. St. Clair's income over a period of years or the various positions that he held, or for that matter, the state of his health.
>
> There has been some testimony read to you in which a witness was asked whether or not he made a statement to an F. B. I. agent, and he testified that he did not. But no evidence has been introduced to contradict that witness nor to prove that he did in fact make (495) such a statement. Whether he did or not is entirely up to you and within your sole and exclusive province.
>
> The fact that the F. B. I. agent was not produced or the alleged statement was not produced would seem to me to have an important bearing in determining the credibility of the witness's answer" (A 121-122).

The jury returned a verdict for Plaintiff in the total sum of $24,000 and pursuant to the instructions of the Court and in accordance with the applicable death act, they allocated to the surviving widow the sum of $15,000 and $9,000 to the surviving minor child by a prior marriage.[9]

[9] The jury awarded the minor child the amount she would have received under the divorce decree to majority, viz. $600.00 per annum × 15 years = $9,000.00. Decedent disinherited his child under his Will, Plaintiff's Exhibit 12 (A 306-307), which he executed on July 15, 1949 in Florida while he was on his honeymoon with his third wife (A 216).

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals erroneously decided a Federal question of major importance in a manner contrary to decisions of this Court and decisions of the Courts of Appeals for the District of Columbia, Second, Third, Fourth, Fifth, Eighth and Ninth Circuits.

The District of Columbia Death Act originally enacted by Congress in 1885 was "patterned after Lord Campbell's Act", *Ciarrocchi* v. *Kane Co.*, 116 F. Supp. 848, 850 (D. D. C. 1953). The amount recoverable by the widow and next of kin must be based upon "some reasonable expectation of pecuniary assistance or support of which they have been deprived", *Tate* v. *Nelson*, 71 F. Supp. 465, 468 (D. D. C. 1947). Since the applicable death act was patterned after the original Lord Campbell's English Death Act, expressions of other Courts construing similar death acts are relevant to the interpretation of the applicable death act.

The Opinion of the Court of Appeals below held evidence elicited on the cross-examination of the widow concerning

1. her initial acquaintanceship with decedent;
2. her knowledge at the time she began seeing him that he was married to another woman;
3. her familiarity with the progress of the divorce suit brought by his prior wife; and

4. whether the decedent had been living at the respondent's apartment prior to their marriage

was irrelevant to the question of the pecuniary loss suffered by the respondent and by decedent's child and should not have been admitted. The Court of Appeals below states in its opinion that *certain limited evidence of the personal habits and qualities of the deceased are to some degree relevant.* The opinion below further states:

> "The defendant should not be permitted to put in evidence anything he may unearth which reflects unfavorably upon the decedent. Except as they may show a propensity of the decedent to spend his income in ways which do not enure to the benefit of his family, the details of his personal life are not in issue and, in the present case, the history of St. Clair's relationship with plaintiff bore no relation to any matter which was in issue. * * * Moreover, in the case before us, any remote evidentiary value that the details of the decedent's personal life may have had was far outweighed by the certainty that prejudice to the plaintiff's case in the minds of the jurors would result from the introduction of evidence showing in an ill light not only the decedent but the plaintiff as well."

A. The Court of Appeals Erroneously Decided a Federal Question of Major Importance in a Manner Contrary to Decisions of this Court.

In so deciding the Court below expressed a view contrary to Opinions of this Court:

In *Baltimore and Potomac Railroad Company* v. *Mackey*, 157 U. S. 72, (1895), this Court in in-

terpreting the *District of Columbia Death Act* approved the following charge to the jury:

> "Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and *then, gentlemen, from all the facts and all the circumstances*, make up your mind how much this family, *if anything*, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving; how much had they a reasonable expectation of receiving while he lived, if he had not been killed." (p. 92) (Italics ours).

In *Norfolk & Western Railway Company* v. *Holbrook*, 235 U. S. 625 (1915), this Court, in reversing on other grounds the judgment entered below under the Federal Employer's Liability Act, did not disapprove that part of the trial court's charge reading:

> "(I)t will be the duty of the jury to consider his age, health, habits, industry, intelligence, *character*, and expectancy of life, as shown by the evidence introduced before you." (p. 628) (Italics ours).

Justice McKenna, in his dissenting opinion in that case states:

> "The jury were told to consider the age, health, habits, industry, intelligences and *character of the deceased*—his expectancy of life,

as shown by the evidence—all, I may say in passing, strictly *legal elements* and none found fault with." (p. 632) (Italics ours).

In *Railroad Company* v. *Barron*, 72 U. S. 90, (1866), this Court in interpreting the Illinois Death Act[10] stated:

> "The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury upon *all the facts and circumstances of the particular* case. *, * *
>
> There is difficulty in either case (personal injury or wrongful death case) in getting at the pecuniary loss with precision or accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases *the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury.*" (pp. 105-106) (Italics ours).

B. The Court of Appeals Erroneously Decided a Federal Question of Major Importance in a Manner Contrary to Decisions of the Court of Appeals for the District of Columbia.

The opinion below is contrary to the decisions of the Court of Appeals for the District of Columbia *in its interpretation of its own Death Act* for the District of Columbia.

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[10] See *United States Electric Lighting Co.* v. *Sullivan*, post, Court of Appeals for the District of Columbia, pp. 135-136, where it is stated that the Illinois Death Act is substantially identical to the District of Columbia Death Act.

In *United States Electric Lighting Co.* v. *Sullivan*, 22 App. D. C. 115, (1903) the Court said:

> "The charge given, instead, was that 'the plaintiff is entitled to recover such sum as will fairly and reasonably compensate the father of the decedent for any financial loss * * * sustained by reason of the decedent's death; such loss to be measured by such sum as the evidence may show the said father would have probably received from the decedent had he continued to live.'
>
> We are of the opinion that there was no error in the charge to the jury. As has been said by Mr. Justice Nelson: 'The *damages in these cases* whether the suit is in the name of the injured party, or, in the case of his death, under the statute by the legal representative, *must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case.* * * *'" (p. 135) (Italics ours).

The Court of Appeals for the District of Columbia further stated in this opinion:

> "Under the New York statute, which also limits the damages to be assessed for the benefit of the widow and next of kin to 'a fair and just compensation for the pecuniary injuries resulting from the decedent's death,' it was said by the court of appeals of that state: 'In but few cases arising under this act is the plaintiff able to show direct, specific, pecuniary loss, suffered by the next of kin from the death; and, generally, the basis for the allowance of damages has to be found in *proof of the character, qualities, capa-*

> *city, and condition of the deceased and in the age, sex, circumstances, and conditions of the next of kin.* The proof may be unsatisfactory, and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can.' *Lockwood* v. *New York, L. E. & W. R. Co.* 98 N. Y. 523, 526. See also, *Bickel* v. *Knickerbocker Ice Co.* 110 N. Y. 504, 508, 18 N. E. 108." (p. 135) (Italics ours).

In *Baltimore & Potomac Railroad Co.* v. *Golway*, 6 App. D. C. 143 (1895), the Court of Appeals for the District of Columbia stated, that in awarding damages, the jury should consider:

> "The age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family * * * and then, gentlemen, from *all the facts and all the circumstances*, make up your mind how much this family, *if anything*, pecuniarily loses by his death." (p. 180). (Italics ours).

In *Rankin* v. *Storage*, 234 F. (2d) 35 (App. D. C. 1956), the Court of Appeals for the District of Columbia approved the following charge to the jury:

> "The amount of damages to be awarded must be based largely on the good sense and sound judgment of the jury * * * and the amount must be based upon *all the facts and circumstances of the case* * * *." (pp. 36-37) (Italics ours).

C. The Court of Appeals Erroneously Decided a Federal Question of Major Importance in a Manner Contrary to Decisions of the Courts of Appeals for the Second, Third, Fourth, Fifth, Eighth and Ninth Circuits.

In the decisions listed below, the Courts of Appeals have found the following evidence to be relevant to the issue of pecuniary loss:

O'Connor v. *U. S.*, 269 F. 2d 578, 582 (2 Cir., 1959)—[Oklahoma Death Act]—"habits";

The Voland, 181 Fed. 643, 659 (2 Cir. 1910), [New York Death Act]—"his qualities";

Stafford v. *Roadway Transit Co.*, 165 F. 2d 920 (3 Cir. 1948), affirming 73 F. Supp. 458 and 70 F. Supp. 555, 571—[Pennsylvania Death Act]—"manner of living, personal habits, individual characteristics, and all other matters";

Speich v. *Crowley*, 94 F. (2d) 543 (3 Cir. 1938), affirming 19 F. Supp. 857, 858—[Pennsylvania Death Act]—"habits of life";

Philadelphia & R. R. Co. v. *Baker*, 155 Fed. 407 (3 Cir. 1907), affirming 149 Fed. 882, 887—[Pennsylvania Death Act]—"good habits";

United States v. *Brooks*, 176 F. 2d 482, 484-485 (4 Cir. 1949)—[North Carolina Death Act]—"all the facts and circumstances"—"habits";

Illinois Central R. Co. v. *O'Neill*, 177 Fed. 328, 332 (5 Cir. 1910)—[locus of death not stated]—"all the probabilities";

Florida Coat. & P. R. Co. v. *Sullivan*, 120 Fed. 799, 804 (5 Cir. 1903)—[Florida Death Act]—"character";

St. Louis & S. F. R. Co. v. *Duke*, 192 Fed. 306 (8 Cir. 1911), affirming 172 Fed. 684, 690—[Federal Employer's Liability Act]—"character, habits or morals of deceased";

Butte Electric Ry. Co. v. *Jones*, 164 Fed. 308, 311 (9 Cir. 1908)—[Montana Death Act]—"all the circumstances"[11]—"kindly woman"—"excellent character"; and

Southern Pac. Co. v. *Lafferty*, 57 Fed. 536, 544 (9 Cir. 1893)—[California Death Act][12]—"all the circumstances".

It is respectfully submitted that *merely upon the summary of the cases heretofore presented*, there exist special, important and compelling reasons warranting this Court to exercise its sound judicial discretion in this case to issue a writ of certiorari under Rule 19 of this Court. The Court of Appeals in its decision below has rendered a decision on a Federal question of major substance in a way in conflict with applicable decisions of this Court; applicable decisions of the Court of Appeals for the District of Columbia; and in conflict with decisions of the Courts of Appeals for the Second, Third, Fourth, Fifth, Eighth and Ninth Circuits.

The recognized similarity between the Federal Death Acts, viz. District of Columbia Death Act, Death on the High Seas Act, and Federal Employers' Liability Act, all having their genesis in the United States Congress, causes the decision below to assume tremendous importance to the public, and, it is submitted, the confusion engendered by the erroneous

[11] Similar to New York Death Act, 164 Fed. 310.

[12] Similar to New York Death Act 164 Fed. 310.

opinion of the court below is so self-evident that the Petitioner need neither stress nor emphasize the paramount necessity for this Court to exercise its discretion and supervisory power on the review sought herein.

This Court has, on numerous occasions, recognized that the issue of the construction of a Federal statute having nation-wide effect is "among the most important issues for final determination by this Court"; see *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 439 —[1957—concurring opinion of Mr. Justice Frankfurter]. Concededly the geographical area of the District of Columbia, the locus of the collision between the airplanes[13], is relatively small, but the application of the opinion has nation-wide effect in numerous Federal court jurisdictions.

As noted in the opinion below, respondent claimed on her appeal to the Court of Appeals that the verdict was grossly inadequate and that numerous errors were committed in the admission of evidence and in the charge of the court. At the trial, the trial judge charged the jury on the question of pecuniary loss as follows:

> "Now you should consider his age at the time of his death, his health, *his habits*, his industry,

[13] *See Union Trust Co.* v. *U. S.*, 113 F. Supp. 80, 85 (D. D. C. 1953); [3 Avi. 18,177] wherein the trial judge in the controlling United States decision on liability and situs of the collision concurred with the jury's finding that the accident occurred over the District of Columbia; this concurrence with the jury's finding being the opinion of the District Judge in the companion controlling case against Eastern Air Lines on Defendant's Motion to Set Aside the Jury Verdict—an issue before this Court during 1957 when Petitioner Eastern Air Lines Inc. in the *Union Trust Co.* case filed a Petition for Writ of Certiorari, which was denied, 353 U. S. 942.

his intelligence, *his character*, and his expectation of life as you recall the evidence" (A 120) (Italics ours).

This charge is precisely in accord with the long standing and well recognized elements admissible on the issue of pecuniary loss in a wrongful death action as set forth in the cases heretofore discussed.

Both parties recognize that "all the facts and circumstances" are relevant to the issue of pecuniary loss. Respondent submitted to the trial court the following Requests to Charge [Requests Nos. 17 and 28] in this case:

> "17. In determining the amount which the plaintiff is entitled to recover, 'The jury cannot estimate in dollars and cents exactly what the damages are in a case of this kind * * * that is not possible. But [the jury] may and should take into consideration the age of the man, his health and strength; his capacity to earn money as [the jury] discover it from the evidence, his family—who they are and what they consist of—and then * * * *from all the facts and all the circumstances*, make up [their] mind how much this family, * * * probably lose by his death, and that would be, how much had this family a reasonable expectation of receiving? How much had they a reasonable expectation of receiving while he lived, if he had not been killed.' *Baltimore & P. R. R. Co.* v. *Mackey*, 157 U. S. 72" (A 105)[13] (Italics ours).
>
> "28. Evidence of damage in a death action is necessarily speculative and cannot be determined

[13] See p. 28 supra of this Petition.

with a mathematical precision' but 'any fact shedding light on the question is relevant.' *Bayce v. New York City Ry.*, 126 App. Div. 248", (A 107).

The attorney for respondent did not object nor take an exception to that part of the charge referring to "habits" and "character" as noted from the following:[15]

The Court at the end of the presentation of the charge to the jury asked:

"Are there any exceptions?

Mr. Reilly: None on the part of the defendant, sir.

Mr. Ticktin: We——

The Court: Just say yes or no.

Mr. Ticktin: Yes, your Honor.

The Court: The law requires that I hear counsel outside of your presence, so will you excuse us for just a moment.

(The following proceedings took place in the robing room, in the absence of the jury).

The Court: All right Mr. Ticktin.

Mr. Ticktin: The plaintiff excepts to so much of the Court's charge as rejects, ignores or is contrary to any of the requests to charge submitted to (497) the Court, unless you like to mark in evidence, if I may, your Honor, the requests to charge.

The Court: Yes. You may have an exception.

Mr. Ticktin: Thank you, sir" (A 123).

[15] Respondent's Request to Charge No. 42 (A 109) "evidence of intemperate habits is inadmissible in mitigation of damages in death actions" is not to the contrary. The Opinion below correctly recognizes that evidence of excessive drinking is admissible.

The recognized similarity between various Federal Death Acts and numerous Wrongful Death Acts of the individual states and the impact of the decision below on the interpretation of similar Lord Campbell Death Acts, requires this Court to exercise its judicial discretion to review the opinion rendered below. Petitioner need not impress upon this Court the confusion which will be engendered by the opinion below. If the Court of Appeals' opinion is not reversed by this Court under its supervisory powers and is permitted to represent the existing law on the subject of pecuniary loss which precludes a party from introducing evidence concerning decedent unless such evidence "may show a propensity of the decedent to spend his income in ways which do not inure to the benefit of his family", the converse of the propositions of law is equally applicable and plaintiffs in such death actions should be also so precluded from showing the positive traits of character of the deceased.

It is submitted, the fallacy of the reasoning of the Court of Appeals is eloquently exemplified by its reliance upon the decision of *Lipcomb* v. *Houston & T. C. R. Co.*, 95 Tex. 5, 10, 64 S. W. 923, 927, (1901). In that case the court held:

> "Upon the measure of damages, evidence that the deceased was a member of the church, and did not use profane language, was too remote to be of value in determining the pecuniary loss of plaintiffs."

It is submitted that the inability of the Court below to locate any substantial opinion as authority for its revolutionary proposition of law casts suspicion upon that Court. The reasoning of that Court to create a

reversible error of law based upon the erroneous admission of character evidence which it claims to have been irrelevant to the pecuniary issue, encourages Petitioner to argue that the Court below, in effect was usurping the function of the jury by setting aside its verdict.

It is submitted that the Court below, in its reliance upon the 1901 decision of a Texas court in an action predicated upon the Wrongful-Death Act of the District of Columbia, tried in the Southern District of New York, has acted in a manner contrary to the instruction of this Court set forth in *Chesapeake & Ohio Ry.* v. *Kelly, infra*, and for that reason alone, this Court, in its supervisory capacity should review the decision below. In *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. 485 (1915) this Court held:

> "But the question of the proper measure of damages is inseparably connected with the right of action and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts" (p. 490).

Courts of the forum, viz. New York, have consistently held habits, character and the like of decedent are admissible on the issue of pecuniary loss. *Eder* v. *Cashin*, 281 App. Div. 456, 120 N. Y. S. 2d 165, 169 [3rd Dept. 1953] (New York Death Act); and *Hill* v. *Erie Railroad Co.*, 225 App. Div. 19, 232 N. Y. S. 66 [4th Dept. 1928] (New York Death Act). See pp. 30-32 of this Petition for pertinent decisions under the District of Columbia Death Act.

In this case not only the life expectancy of the deceased and respondent was relevant to the issue of the pecuniary loss sustained by respondent, but also, and

more realistically, their marital life expectancy was relevant and before the jury. It is submitted that the evidence held irrelevant and prejudicial to respondent had a direct bearing on the issue of their marital life expectancy. The statement of the Court below that character evidence of an ante-nuptial nature concerning the deceased, occurring within a year prior to death, is irrelevant to the issue of pecuniary loss is, it is submitted, fallacious reasoning, contrary to prior decisions and contrary to present day experiences.

That a question of such magnitude in its application, involving a Federal question of major importance and of increasing concern to the public, as a result of interstate travel, should be governed by a different rule of law in the Second Circuit and remain unreviewed by this Court is undesirable and for this reason alone this Court should issue a writ of certiorari to review the opinion below.

II

The Court of Appeals decided the question of the admissibility of the cross examination of the witness Stoller and the charge thereon in a way in conflict with applicable State law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner respectfully refers this Court to pages 23-26 of this petition which set forth generally the events occurring at trial with reference to the reading of the deposition of this witness for respondent; petitioner's cross-examination of said witness; and the

charge of the court with respect thereto. Petitioner, for purposes of emphasis, reiterates that this witness for respondent testified on direct examination to decedent's business ability and that he had never seen decedent under the influence of liquor during 1949 (A 353). Respondent's witness, Dr. Fortner, who treated decedent for excessive drinking during the same period [March 4-May 15, 1949] and who had confined decedent in the Sun Ray Park Health Resort for excessive drinking during April, 1949 on two occasions expressly contradicts the direct testimony of witness Stoller concerning decedent's sobriety during the same period. The testimony of Dr. Fortner on direct and cross examination establishes that contradiction (A 91-99; A 273-293). (See also footnote 8 supra and Plaintiff's Exhibits 33, 34-40 inclusive).

The issue of the admissibility of the questions put to the witness Stoller on cross examination, being a procedural matter, is subject to Rule 43 of the Federal Rules of Civil Procedure. Rule 43 reads in part:

> "* * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. * * *"

No statute of the United States is applicable to this procedural determination made by the Court below

and no rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity are applicable; therefore, rules of evidence applied in the courts of general jurisdiction of the State in which the United States Court sits governs.

The opinion below states that the cross examination of this witness and the charge relating thereto:

> "were in themselves sufficiently prejudicial to require a reversal."

It is submitted, that the overwhelming evidence of the physical condition of decedent during this period, which was established by other proof, clearly shows that the ruling of the trial judge and his instructions to the jury concerning an F. B. I. statement, if it be error at all, which Petitioner denies, did not constitute the type of prejudicial error requiring a reversal of the judgment.[16]

In *People* v. *Ferraro*, 293 N. Y. 51 (1944), where defendant was convicted of *murder in the second degree*, the court held references to extra judicial statements of witnesses and the trial court's attempts to correct such references, was reversible error in that *murder* case, but this reversal was specifically qualified when the court said on page 57:

> "*Under other circumstances, and in a case free from doubt upon the main issue of guilt, such an error might be disregarded* under Section 542 of the Code of Criminal Procedure *as not affecting*

[16] The attorney for respondent concedes on his oral argument of the motion to set aside the jury verdict and for new trial (App. p. 3) that the charge given to the jury on the question of the alleged statement given by witness Stoller to the F. B. I. agent gave to the jury the impression that it was reasonable to assume that of Brody was not produced at the trial, that the statement was not made.

the substantial rights of the defendant; but where, as in this case, extremely close questions of fact controlled determination of the plea of self-defense *and the defendant's intent to kill*, we may not say such an error did not affect the substantial rights of the defendant involved in the jury's determination of guilt" (Italics ours).

A fortiori, *in a civil case* where the overwhelming evidence creates an inference of the fact sought to be established by the alleged improper introduction of a suggestion of an F. B. I. Report, "such an error (if error there was) might be disregarded . . . as not affecting the substantial rights of the defendant (respondent in the instant case)". *People* v. *Ferraro*, *supra*. Therefore no error was committed by the trial court warranting a reversal of the judgment.

The opinion below cites four cases as authority for its speculative reasoning as to the status of the interrogation of the witness if the trial judge had inquired of Petitioner's attorney whether he intended to proffer the F. B. I. agent as an impeaching witness.

The four cases relied upon by the Court below are distinguishable.[17]

The decision of *Philadelphia & R. Ry. Co.* v. *Bartsch*, 9 Fed. 2d 858, 861 (3rd Cir.), cited by the

[17] *People* v. *Sanders*, 192 N. E. 696 (Illinois)—criminal appeal. On the cross examination of *a defendant* (not *a witness*) concerning extra judicial statement was allowed over objection. The making of statement was denied. Court held question proper only as an impeachment question. That Court said: "*In view of the other evidence in the record, we would not, however, reverse the case by reason, alone, of the asking of this question.* (P. 702)."

Horton v. *Mason*, 82 N. E. 2d 671; 341 Ill. App. 66 (Only an abstract of the opinion was published)—Cross examination of a 12 year old plaintiff by an extra judicial statement purportedly made by her and fraudulently obtained, which was admitted into evidence—held reversible error.

Court below is not a decision of the State of New York and is distinguishable. In that case there was no overwhelming evidence creating an inference sought to be drawn by the purported improper cross examination of the witness and the trial judge did not attempt to correct the introduction of the use of the witness's statement as was done in the charge in this case (see p. 26 supra). See also: *United States* v. *Angelo*, 153 Fed. 2d 247, 252 (3rd Cir. 1946) where the Court discusses the *Bartsch* decision supra and notes that the question of whether use of such a statement and the trial court's ruling thereon is prejudicial is a question of degree based upon all of the circumstances.

It is submitted that the opinion of the Court below should be reviewed by this Court under its supervisory powers.

Conclusion

In the judgment below the Court of Appeals erroneously decided a Federal question of major importance in a manner contrary to decisions of this Court and decisions of the Courts of Appeals for the District of Columbia, Second, Third, Fourth, Fifth, Eighth and Ninth Circuits.

Keston v. *Forbes*, 273 App. Div. 646; 78 N. Y. S. 2d 769—held error to exclude on cross examination of a witness a prior inconsistent signed statement of the witness which was introduced solely to impeach the credibility of the witness.

Miller v. *Henderson*, 124 A. 2d 23; [N. J. Superior Court]—held it was proper to introduce a prior inconsistent statement made by a *party* even though the cross examining attorney told the Court that he did not intend to proffer as a witness the Ohio attorney-investigator who took the statement. The Court *in dicta* also discussed prior inconsistent statements of witnesses in contra distinction to parties

Furthermore, the Court of Appeals below decided the question of the admissibility of the cross examination of the witness Stoller and the charge thereon in a way in conflict with applicable state law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is submitted accordingly that this Court should grant this petition for a writ of certiorari, and should reverse the judgment below.

Respectfully submitted,

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